

Resident Screening Update

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Resident Screening Update

- ▶ HUD OGC Guidance (Apr. '16)
 - ▶ DOJ Statement of Interest (Fortune Society v. Sandcastle)(Oct. '16)
 - ▶ House Members' Letter (Sep. '16)
- ▶ Recent FTC Business Guidance
 - ▶ Landlords, Tenant Screening Firms (Oct. '16)
 - ▶ Data Breach Response (Sep. '16)
- ▶ Industry Trends

HUD Office of General Counsel - Application of Fair Housing Act Standards to the Use of Criminal Records (Apr. '16)

- ▶ Criminal history screening policy may have a disparate impact on minorities
- ▶ Landlords will have to show that their policy is “necessary to achieve a substantial, legitimate, nondiscriminatory interest”
 - ▶ “Bald assertions based on generalizations or stereotypes that any individual with an arrest or conviction record poses a greater risk [e.g., to resident safety and property] than any individual without such a record are not sufficient.” p. 5
- ▶ Arrests: “A housing provider who denies housing to persons on the basis of arrests not resulting in conviction cannot prove that the exclusion actually assists in protecting resident safety and/or property.” p. 5
 - ▶ Arrest records may not be the basis for denying admission, terminating assistance, or evicting tenants from public and other federally-assisted housing HUD PIH Notice 2015-19
 - ▶ Practice Point: Do you want them reported at all by your screening provider?

HUD OGC - Application of FHAct Standards to the Use of Criminal Records (Apr. '16)

- ▶ Blanket Bans Banned: “A housing provider that imposes a blanket prohibition on any person with any conviction record - no matter when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then - will be unable to meet [its] burden.” p. 6
 - ▶ “A policy or practice that fails to consider the nature, severity, and recency of criminal conduct is unlikely to be proven necessary to serve a “substantial, legitimate, nondiscriminatory interest” of the provider” p. 7
- ▶ Instead: “Individualized assessment of relevant mitigating information beyond that contained in an individual’s criminal record is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account.” p. 7
- ▶ https://portal.hud.gov/hudportal/documents/huddoc?id=HUD_OGCGuidAppFHAStandCR.pdf (April 4, 2016)

DOJ Statement of Interest (Fortune Society)

- ▶ “Generalized safety concerns” not sufficient biz justification for LL
- ▶ “Categorical prohibitions that do not consider when the conviction occurred, what the underlying conduct entailed, or what the convicted person has done since then run a substantial risk of having a disparate impact based on race or national origin.”
- ▶ LL’s Screening Standard -
 - ▶ Reject apps w/ felony or non-traffic misdemeanor convictions
- ▶ www.justice.gov/crt/case-document/statement-interest-fortune-society-inc-v-sandcastle-towers-housing-development

Individualized Assessment Factors - In Practice

- ▶ Severity of any conviction
 - ▶ Practice Point: Categorize like criminal conduct alike for consistent decisioning across portfolio (felony assault vs. misdemeanor assault)
 - ▶ Practice Point: Severe enough? Traffic cases. Misdemeanors. Sex offenses not requiring lifetime registration
 - ▶ Statutory Exception: Can decline for conviction for illegal manufacture or possession of a controlled substance (under 807(b)(4))
- ▶ Recency of conviction
 - ▶ Note: “After six or seven years without reoffending, the risk of new offenses by persons with a prior criminal history begins to approximate the risk of new offenses among persons with no criminal record.” p. 7, citing Kurlychek
 - ▶ Practice point: Turn off everything beyond 7 years, even if reportable under FCRA? Criminal convictions are reportable indefinitely in most states under the FCRA.

Individualized Assessment Factors - In Practice

- ▶ Age at the time of conviction and age now
 - ▶ Note: Propensity to commit a crime peaks in teens and early twenties. Over 80% of people stop committing crimes by age 28 (Ward & Maruna)
- ▶ Frequency of criminal convictions
 - ▶ Recidivism typically occurs within 3 years of offense or release, or not at all (Laub & Sampson, Bushway & Sweeten)
- ▶ Any evidence of rehabilitation or evidence that the applicant has maintained a good tenant history before and/or after the conviction
 - ▶ Practice Point: Disclose clearly process for providing mitigating evidence - Reasonable Accommodation Request Process

Individualized Assessment Factors- In Practice – Additional Considerations

- ▶ Two step process - credit and L/T to narrow applicant pool - then criminal history?
 - ▶ “By delaying consideration of criminal history until after an individual’s financial and other qualifications are verified, a housing provider may be able to minimize any additional costs that such individualized assessment might add to the applicant screening process.
- ▶ An individualized review may also determine that the conviction record obtained by the housing provider is wrong.” (Fortune Society, fn 19.)
 - ▶ Housing provider has duty to evaluate accuracy of criminal report against applicant info
- ▶ Evaluation of a complete criminal record may mean an additional county-level records search on any “hits”
- ▶ For consistent decisioning, set up internal appeals/review process for criminal declines - e.g., in-house counsel at regional/corporate level
 - ▶ Confer with outside counsel annually on application of criteria, results, and any changes

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FTC GUIDANCE - RESIDENT SCREENING AND DATA BREACH

FTC Screening Guidance - Landlords

- ▶ Certification: LL must certify to CRA that LL will only use for tenant screening (not mortgage, employment purpose)
- ▶ Adverse Action Notice: Required not just for declines, but also for added rent, deposit, co-signer reqs too.
- ▶ Disposal of Consumer Reports - reasonable methods, due diligence of document destruction contractor
- ▶ Furnishing Data (e.g., to Bureaus) - Furnisher policy required of LL
- ▶ <https://www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-landlords-need-know>

FTC Guidance – Resident Screening Firms

- ▶ Accuracy Concerns:
 - ▶ Report has history for person w/ Diff MI or DOB,
 - ▶ Multiple entries for same offense
 - ▶ Expunged or sealed records
 - ▶ Records w/o outcomes – e.g., housing court records
- ▶ Certification: of use for housing (permissible purpose)
- ▶ Consumer disclosure and reinvestigations
- ▶ <https://www.ftc.gov/tips-advice/business-center/guidance/what-tenant-background-screening-companies-need-know-about-fair>

FTC - Data Breach Response - New Guidance (Sept. '16)

- ▶ Secure Operations
 - ▶ Assemble Experts, Secure Physical Area, Stop Data Loss,
- ▶ Fix Vulnerabilities
 - ▶ Service Providers, Network Segmentation, Forensics Experts, Communications Plan
- ▶ Notify Affected Parties
 - ▶ Law Enforcement, Business, Consumers
 - ▶ Model Notification Letter
- ▶ <https://www.ftc.gov/tips-advice/business-center/guidance/data-breach-response-guide-business>

RESIDENT SCREENING TRENDS

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Rental Housing Industry Screening & Data Privacy Trends

- ▶ Renter Applicant Fraud Products
- ▶ Prequalification of Applicant Products
- ▶ Furnishing “Credit Reporting” Rental History Data
- ▶ Bureaus: Change in Civil Public Records (e.g., Eviction) Reported by Q2 '17